Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

PAUL O. SPINDEN,

Petitioner,

v.

GS ROOFING PRODUCTS COMPANY, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Eighth Circuit ignored this Court's ruling in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), that the finding of a primary duty is a finding of fact subject to Fed. R. Civ. P. 52 and instead made its own finding of primary duty by drawing inferences from facts that permitted differing views and attached significance to facts found insignificant by the District, essentially usurping the role of the District Court and totally ignoring this Court's teaching in *Icicle Seafoods*.

2. The Eighth Circuit based its reversal on finding that the District Court used time alone to determine primary duty under the FLSA. This finding ignores the District Court's clear statement that it considered time and the importance of all duties performed in light of all facts and circumstances and fails to give deference due District Court findings.

3. The Eighth Circuit's finding of primary duty alters the "short form" test, fails to require the primary duty be directly related to management policies or general business operations and sets a rule of law for what constitutes "frequent" exercise of discretion, all of which are contrary to 29 U.S.C. §213 and the Secretary of Labor's regulations.

PARTIES

Petitioner Paul O. Spinden and Respondent GS Roofing Products Company, Inc., were parties to the proceedings in the Eighth Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 22, 1996, denying Petitioner's claim for overtime pay under the Provisions of the Fair Labor Standards Act, 29 U.S.C. §207.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, reported at 94 F.3d 421 (8th Cir. 1996), is reprinted as Appendix A. It reverses a portion of the judgment of the United States District Court for the Eastern District of Arkansas, holding Petitioner to be nonexempt from the provisions of the Fair Labor Standards Act (FLSA).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 22, 1996. Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The court below entered an order denying the petition on October 30, 1996, and amended that order on November 4, 1996, reprinted as Appendix B and C, respectively. The petition is filed within ninety days of that date. The jurisdiction of this Court to review the judgment on petition for a writ of certiorari rests upon 28 U.S.C. §1254(l).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions are 29 U.S.C. §§207, 213, and 216. Also of significance to determining this case are Regulations 29 C.F.R. §541.2, 541.103, 541.202-208. The C.F.R. sections are reprinted as Appendix E.

STATEMENT OF THE CASE

The Eighth Circuit reviewed *de novo* the District Court's factual findings, inferred from disputed facts, concerning Petitioner's exemption from the overtime compensation provisions of the FLSA on the ground that the lower court had not heeded the Secretary of Labor's regulations. Although the District Court's findings contradicted this conclusion, the Eighth Circuit refused to accept the lower court at its word. Despite a disputed record, it made its own findings of fact by reviewing the record and drawing its own inferences from disputed facts, some of which were even outside the relevant time frame. It attached significance to facts found insignificant by the District Court and accepted the testimony of witnesses though contradicted by others. Even though this case turned totally on the facts, the Eighth Circuit refused to remand to the District Court for findings of fact consistent with the appropriate legal standard on the erroneous notion that its independent findings of fact rested on "undisputed evidence."

The Eighth Circuit compounded its error by misapplying the FLSA exemptions in a way which repudiates this Court's mandate that "exemptions . . . be narrowly construed against the employer seeking to assert them

and that their application [be] limited to those establishments plainly and unmistakably within their terms and spirit . . . " *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 398 (1960). The effect of the Eighth Circuit's decision is to relax the Secretary of Labor's exemption requirements so that employers will no longer be held to clear proof of entitlement to an exemption.

Summary of Facts

Petitioner worked at Respondent's Little Rock roofing materials manufacturing plant from January 1985 to September 1993. Petitioner's title when he began was plant accountant, and he supervised two employees, an accounts payable clerk, and an accounting clerk. Both clerks were laid off in late 1986, and Petitioner was charged with assuming their duties. When fourteen of the predecessor's management employees purchased the firm in November 1988, Petitioner's title changed to controller, but his duties did not change significantly. The corporate comptroller testified that Petitioner had virtually no time to perform controller work because of the magnitude of the clerical work he had to perform daily to keep pace.

The only financial reports Petitioner produced required him merely to gather figures from others and to "plug" them into forms dictated by corporate headquarters in Irving, Texas, without analysis. Petitioner's supervisors at corporate headquarters set up the reporting structure and supervised Petitioner's work, including

enforcement of deadlines. Petitioner and two former corporate officers testified that Petitioner was never called upon to offer analytical opinions concerning Respondent's business operations. Petitioner attended a weekly plant management team meeting, but he testified that he was never called up to do anything other than provide figures from the company's records, and he never determined corporate business policy. Petitioner testified that he made no analysis or inferences from the reports he prepared, but he did answer infrequent questions concerning the accuracy of the numbers reported.

Petitioner's annual salary was $42,792. Although he requested it throughout his years with the firm, he never received any overtime compensation. He routinely worked 60 hours a week or more endeavoring to meet corporate demands. During this time, Respondent was centralizing its accounting functions to the point of eliminating Petitioner's position after he retired and reassigned those duties to the corporate account staff. The clerks who had been laid off had been paid $18,000 or more per year and received overtime compensation.

The District Court Decision

Petitioner commenced this action by filing a petition in August, 1993, in the District Court. Jurisdiction was invoked pursuant to 28 U.S.C. §1331. Petitioner sued under the Age Discrimination Employment Act, 29 U.S.C, §§621 et seq., alleging age discrimination by Respondent, and under the FLSA for overtime premium payment pursuant to 29 U.S.C. §§201 et seq. The District Court tried

the claims simultaneously in a five-day trial with the age discrimination claim before a jury and the wage claim tried to the bench. The jury found for Respondent on the age claim, and Petitioner did not appeal.

Respondent asserted as an affirmative defense to Petitioner's wage claim that Petitioner's duties were exempted from the FLSA under the administrative exemption. The District Court ruled that Respondent had failed to meet its burden of proving the exemption.

Before announcing its findings of fact, the District Court articulated the legal standard by which it was judging the case. The District Court recognized that it was obligated to first determine Petitioner's primary duty by employing the guidelines set out in 29 C.F.R. §541.103 when it stated:

> Well, let me tell you my paraphrase of 29 C.F.R. §541.103. The primary duty concept relates to the relative importance of the employee's administrative duties rather than the amount of time spent in a given activity. So that an employee can spend more than 50 percent of his or her time in a routine, non exempt type of work and still qualify for the administrative exemption. (Tr. 555-556)

Respondent concurred with the District Court's "paraphrase." *Id.*

The District Court then applied that legal standard to Petitioner's duties. It began with what the Secretary has termed "a useful guide" in §541.103, the amount of time an employee spends doing his or her duties. The District Court found that Petitioner spent 80 to 90 percent of his time doing nonexempt work. (Appendix D-4) The District

Court's analysis did not end there. Consistent with its earlier pronouncement of the legal standard, the District Court said, "I've got to tie it in some way to how much he did and how important it was." Appendix D-5. Considering the importance of Petitioner's duties, the District Court said in its findings "I just don't get the overall impression that he was much more than a bookkeeper. He was something more but not enough for me to find that that was his primary duty, and so that will be the finding of the court on that." (Appendix D-5)

The District Court also considered the frequency with which Petitioner exercised discretion:

> [H]ow much time under all the facts of this case do I think that [Petitioner] spent doing primarily what I'd call administrative, more managerial, decision making, discretion, independent judgment-type things. I know that even though the law is clear that he doesn't have to make the final decision himself, that sending information to others who will make the decision doesn't necessarily – can't necessarily mean that it's an administrative duty because just the purest bookkeepers could send numbers into the corporate or to the plant manager and it would be a basis of the final decision. You could say that he helped or she helped in the decision in that respect. (Appendix D-4)

The District Court added, "I think that clearly that [Petitioner] did more exempt work than his testimony in his view he did, but I don't find that he did much more.". Finally, the District Court said in its findings, "[Petitioner] took over the work of two employees who undeniably did nothing other than clerical, bookkeeping type

work. So, I think he was basically your garden variety bookkeeper with a few administrative duties." (Appendix D-8)

The District ended its findings of fact with the conclusion, "So, bottom line, when viewed as a whole I do not believe he was an administrative employee as defined by the statute and the regulations." *Id.*

Among the regulations to which the District Court referred was the "short form test" of 29 C.F.R. §541.2 which exempted from the FLSA an employee whose primary duty "consist[ed] of . . . office . . . work directly related to management policies or general business operations . . . and . . . includ[ed] work requiring the exercise of discretion and independent judgment." The District Court had found that Petitioner's work of reporting to management did not relate to management policies or business operations and did not require exercise of discretion and independent judgment.

The District Court found that Petitioner and Respondent had agreed that Petitioner's salary was for forty hours of work per week and that petitioner was entitled to 1½-times his normal pay rate for those hours worked over forty.

The District Court entered judgment for Petitioner in the amount of $54,507.28, plus $5,028.86 in simple interest from September 15, 1993, through March 9, 1995, plus post-judgment interest at a rate of 6.57 percent until paid. The District Court also awarded Petitioner attorney's fees and costs.

The Court of Appeals Decision

Looking past what the District Court stated in its findings, the Eighth Circuit declared that the District Court's finding that Petitioner's primary duty was bookkeeping was clearly erroneous because it rested "entirely on [the District Court's] finding that 80 to 90 percent of [Petitioner's] tasks were routine and nondiscretionary in nature. The District Court did not conduct the analysis set out in 29 C.F.R. §541.103, which applies when the 50 percent 'rule of thumb' is inapplicable." The Eighth Circuit set aside the District Court's finding of primary duty, sifted through the record, and made its own findings of fact to which it would apply the proper analysis. Without apparent concern for issues of witness credibility and for the countervailing evidence which caused the District Court to reject the facts as indicators of Petitioner's primary duty, the Eighth Circuit decided Petitioner's primary duty was administrative, not bookkeeping, because:

> Unlike any bookkeeper, [Petitioner] was a member of the Little Rock plant's management team, and participated in weekly meetings with senior management personnel. At these meetings, [Petitioner] and the others discussed issues of importance to [Respondent], including opening a new production line at the Little Rock plant. . . . In addition, [Petitioner's] administrative duties included serving as the registered agent of service of process, computerizing the Little Rock plant's accounting procedures, and signing contracts and tax documents. Perhaps most significantly, [Petitioner] created Variance Reports for [Respondent], which acted as "scorecard" for the Little Rock plant. . . . [Petitioner] agrees that

the Variance Reports were "vital to pricing and production information." (Appendix A-12)

Other facts emphasized by the Eighth Circuit were that Petitioner earned $42,792 while the plant manager earned $65,208 and that Petitioner was not directly supervised by any financial officer at the Little Rock plant but rather took his orders from corporate headquarters in Irving, Texas.

The Eighth Circuit likened the Petitioner to a "one-man department", but it also noted that Petitioner received direction from both the Little Rock plant manager and from superiors at corporate headquarters.

The Eighth Circuit held that a factfinder should determine primary duty, not by measuring time, but by determining which of an employee's duties were of principle importance to his or her employer. In making this determination, the Eighth Circuit did not concern itself with the relative importance of the 'collateral tasks' which occupied the vast majority of Petitioner's work day. The Eighth Circuit's analysis concerning the importance of Petitioner's duties centered on how important having accurate financial reports was to Respondent's setting its prices.

The Eighth Circuit accepted the District Court's finding that Petitioner spent as little as 10 percent of his time performing duties involving discretion and found that this was frequent enough, as a matter of law, to constitute a frequent exercise of discretionary duties and to qualify the employer for the exemption. It considered only the frequency, not the significance, of Petitioner's exercise of discretion.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's usurpation of the District Court's role as factfinder has departed so far from the accepted and usual course of appellate review as to command this Court's intervention as was the case in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), a case virtually identical to this one. In clear violation of Fed. R. Civ. P. 52, the Eighth Circuit reviewed the District Court's findings of fact de novo on the unwarranted notion that the lower court applied the wrong legal standard. A simple reading of the District Court's findings makes clear that the court not only understood the proper legal standard but applied it. The Eighth Circuit refused to accept the lower court at its word.

The Eighth Circuit compounded its error by refusing to remand to the District Court for supplemental findings of fact. Instead, the Eighth Circuit sifted through the record seizing upon facts which Petitioner had not disputed and disregarded the Petitioner's disputing the significance and importance of all of those facts. The Eighth Circuit's concluding that these duties were important enough to constitute Petitioner's primary duty necessarily required it to judge credibility of witnesses, draw its own inferences from disputed facts – some of which were even outside the relevant time frame – and attach significance to facts found insignificant by the District Court. The Eighth Circuit impermissibly substituted its judgment for that of the District Court, and this usurpation must not be ignored under the standard articulated in *Icicle Seafoods*.

The Eighth Circuit further compounded its error by using its independent findings of fact to misconstrue the law.

This Court should review and reverse the Eighth Circuit decision because (1) it usurped the District Court's role as factfinding by making its own facts from a disputed record in a case which turned totally on the facts; (2) the record will simply not support the Eighth Circuit's conclusion that the District Court's findings of fact were based on the wrong legal standard; and (3) the Eighth Circuit itself misapplied the law by construing the FLSA exemptions so broadly by not putting Respondent to a standard of clear proof and thereby unduly broadening the exemption to make it rule rather than the exception. In effect, the Eighth Circuit announced new rules regarding the administrative exemption contrary to the FLSA and the Secretary's regulations.

I. Contrary to this Court's instructions in *Icicle Seafoods*, the Eighth Circuit engaged in impermissible independent factfinding from a record of disputed facts and substituted its own judgment of what was Petitioner's primary duty.

Determination of this case turned on a finding of fact – what was Petitioner's primary duty. The District Court made that finding, as was its province to do, and that determination was subject to the "clearly erroneous" standard articulated in Fed. R. Civ. P. 52(a). *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Walling v. General Industries Company*, 330 U.S., 545, 550 (1947); *Martin v. Cooper Electric Supply Company*, 940 F.2d 896, 900 (3d

Cir. 1991); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1226 (5th Cir. 1990).

On the basis of substantial evidence and a correct application of the law, the District Court found that Petitioner's primary duty was routine bookkeeping. The District Court concluded that routine bookkeeping was not directly related to management policies or business operations and did not involve sufficient exercise of discretion to exempt Petitioner from the FLSA's overtime compensation provisions.

The Eighth Circuit declared the District Court's finding that Petitioner's primary duty was bookkeeping to be clearly erroneous. The Eighth Circuit ruled that the District Court had erroneously rested its finding "entirely" on how much time Petitioner spent doing bookkeeping work and did not apply the proper standards set out in 29 C.F.R. §541.103. As is set forth more completely in the next point, a simple, careful reading of the District Court's findings of fact and the Court's announcement concerning the legal standard it was using makes clear that the Eighth Circuit's ruling is egregiously incorrect; however, even had the Eighth Circuit been correct, it committed reversible error by refusing to remand the case to the District Court for supplemental findings.

Instead, the Eighth Circuit sifted through the record to make its own findings of fact and substituted its judgment for deciding Petitioner's primary duty. This was the precise error made by the Ninth Circuit in *Icicle Seafoods*.

In that case, the trial court declared the employees were "seamen" and were, therefore, exempt from the FLSA. The Ninth Circuit apparently concluded "that the

District Court applied the wrong legal standard for what constitutes a 'seaman' under [the FLSA]." *Icicle* at 713. Instead of remanding the case to the district court for findings in accord with the proper legal standard, the "Court of Appeals reviewed the record independently and found that the 'dominant employment' of the [employees] was 'industrial maintenance,' and that the 'maritime work' took but a small portion of their work time. . . . It therefore concluded that [the employees] were industrial maintenance employees and not seamen." *Id.* This Court declared that to be reversible error:

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own.

Id. at 714.

This case is virtually identical to the *Icicle Seafoods* case. Like the Ninth Circuit, the Eighth Circuit decided that the District Court applied the wrong legal standard in finding Petitioner's primary duty, so it embarked on its own independent factfinding. It went through the record and decided that Petitioner was "[u]nlike any bookkeeper" it knew because of his attendance at management

team meetings. It also noted Petitioner's preparation of a variance report, his designation as the plant's registered agent, his signing a photocopier lease, and his providing input into the Respondent's decision to open a new production line. The Eighth Circuit apparently felt free to rely on these facts because they were "undisputed." What the Eighth Circuit failed to appreciate was that while the Petitioner's "doing" of those duties was not in dispute, the "significance" of those duties was very much in dispute.

Certainly Petitioner did not dispute his attendance at the management team meetings, but what he did there – the role he played there – was much in dispute. Petitioner did not dispute his preparation of a variance report or that it was an important document, as was certainly true of all the work Petitioner did. The Eighth Circuit relied on Respondent's evidence that preparing the report was the most important duty Petitioner had – apparently more important than preparing payroll and accounts payable invoices – because it was the Little Rock plant's "scorecard." The Eighth Circuit either ignored or chose not to believe circumstantial evidence heard by the District Court that Petitioner's preparation of a variance report involved merely "plugging" numbers into a form to be used by the Respondent's decision-makers and did not involve any analysis by Petitioner.

The same is true of the other "undisputed facts" relied upon by the Eighth Circuit. It either ignored or chose not to believe substantial evidence heard by the District Court that Petitioner served as registered agent merely as a convenience to the company and that it never

involved any exercise of discretion,[1]; that he signed one lease for a photocopier, but only as the person who received delivery – not as the person who had selected the machine and negotiated with the vendor; and that he had virtually no input into the decision to begin the new production line other than to report figures appearing in the Respondent's financial books.

Contrary to all concepts of acceptable appellate review, the Eighth Circuit found duties that Petitioner agreed that he did and rejected evidence that those duties were insignificant or unimportant when compared to his other duties – he rarely exercised significant discretion and took all significant instructions from the plant manager and other superiors at corporate headquarters. See 29 C.F.R. §541.103. In making its own findings, the Eighth Circuit necessarily had to decide on the credibility of witnesses and to choose between two permissible views of the evidence. It far exceeded the bounds of acceptable appellate review when it did so. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573-74 (1985). The Eighth Circuit either ignored or chose not to believe substantial evidence which supported the District Court's determination that the duties emphasized by the Eighth Circuit were not important enough to constitute Petitioner's primary duty.

Given the nature of this proceeding – turning almost entirely on a determination of factual issues – the only

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[1] The lack of discretion attached to the position is especially highlighted by the fact that Petitioner was still listed as registered agent 17 month after he let Respondent's employment.

proper remedy open to the Eighth Circuit was to remand to the District Court to apply the appropriate legal standard. In failing to remand the case, the Eighth Circuit disregarded this Court's instruction that an appellate court can make findings of fact when only one inference can be reasonably drawn from the record. *Kungys v. United States*, 485 U.S. 759, 775 n.10 (1988) (citing *Icicle Seafoods*). The United States Court of Appeals for the Federal Circuit said in a case in which it considered whether to remand or to make its own findings of fact:

> Sometimes . . . an appellant will convince us that the law was incorrectly applied, but there are inadequate findings by the district court to enable us to determine independently whether defendant below did or did not prove that [its contention]. That has happened here because . . . there are inadequate findings in a number of regards. In such circumstances, rather than find material facts ourselves, we *must* remand to allow the district court to do so.

Custom Accessories v. Jeffrey-Allan Industries, 807 F.2d 955, 963 (Fed. Cir. 1986) (citing *Icicle Seafoods*) (emphasis added). When the Secretary of Labor asked the Tenth Circuit to conduct a *de novo* review of the record because the district court had not made requisite findings of fact, the court refused: "[O]ur review of the record reveals evidence that would possibly justify a decision on either side of [the issue]. Under these circumstances, factfindings should be made by the district court in the first instance." *Dept. of Labor v. City of Sapulpa, Oklahoma*, 30 F.3d 1285, 1290 (10th Cir. 1994). The court remanded, as the Eighth Circuit should have done in this case.

II. The record simply does not support the Eighth Circuit's conclusion that the District Court's findings of fact were based on the wrong legal standard.

Simple, careful reading of the District Court's findings of fact contradicts the primary premise of the Eighth Circuit's decision – that the District Court's findings of fact were clearly erroneous. The Eighth Circuit set aside the District Court's findings on the unwarranted notion that the trial court "relied entirely on its finding that 80 to 90 percent of [Petitioner's] tasks were routine and non-discretionary in nature" and that it did not employ the standard set out in 29 C.F.R. §541.103. The Eighth Circuit then spent several paragraphs lecturing the District Court that time alone was not a sufficient basis for determining an employee's primary duty.

Certainly, time was a factor considered by the District Court. Indeed the Eighth Circuit has assured, in *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), that time is still an important factor to consider. The Secretary's regulation, 29 C.F.R. §541.103, suggested it as a good beginning point – "a useful guide."

The Eighth Circuit, however, would have been dispelled of the notion that time was the only factor employed by the District Court had it taken the District Court at its word. Before the District Court began its findings of fact, it announced to the parties what legal standard it would be using and invited comment. It said:

> Well, let me tell you my paraphrase of 29 C.F.R. §541.103. The primary duty concept relates to the relative importance of the employee's administrative duties rather than the amount of

> time spent in a given activity. So that employee can spend more than 50 percent of his or her time in a routine, nonexempt type of work and still qualify for the administrative exemption. (Tr. 555-556)

Respondent concurred with the District Court's "paraphrase." *Id.*

Indeed, after the District Court spent a moment in its findings of fact discussing the merits of relying on a bright line test such as time spent doing a duty, the District Court declared that Petitioner spent 80 to 90 percent of his time doing nonexempt work. Had the District Court rested its decision entirely on the time standard, one would expect the District Court's findings to have ended there; they did not.

After considering how much time Petitioner spent doing his various duties, the District Court asked itself, "[I]s that enough to make him nonexempt under all the facts and circumstances of the case?" In other words, the District Court tied its finding concerning the amount of time Petitioner spent doing nonexempt work to "all the facts and circumstances of the case."

Facts and circumstances to be considered in a case were enunciated by the Secretary in 29 C.F.R. §541.103. The District Court, before making its findings of fact, announced that those were the facts and circumstances it was considering.

Indeed, the District began by considering the "frequency with which the employee exercises discretionary powers." Note that when the District Court discussed time, it did so in the context of "how much time under all

the facts of this case . . . I think that [Petitioner] spent doing primarily what I'd call administrative, more managerial, decision making, discretion, independent judgment-type things." This was the same criterion, simply paraphrased as "frequency with which the employee exercises discretionary powers." "Frequency" typically is measured in time.

The District Court said in its findings that another factor it had to consider was "how important" Petitioner's duties were. Indeed the Secretary's regulation suggested that a criterion should be "the relative importance of the managerial duties as compared with other types of duties." The District Court said:

> I think that clearly [Petitioner] did more exempt work than his testimony in his view he did, but I don't find that he did much more. I've got to tie it in some way to how much he did and how important it was. I just don't get the overall impression that he was much more than a bookkeeper. He was something more but not enough for me to find that that was his primary duty, and so that will be the finding of the Court on that. (Appendix A-7)

The Eighth Circuit even failed to appreciate that the District Court agreed with it that Petitioner was more than a mere bookkeeper. In concert with the Eighth Circuit's note that Petitioner had duties unlike "any bookkeeper," the District Court acknowledged that Petitioner was "something more [than a bookkeeper] but not enough for me to find that that was his primary duty. . . . " Later, the District Court added, "I think he was basically

your garden variety bookkeeper with a few administrative duties." (Appendix A-7)

After finding that Petitioner's primary duty was bookkeeping, the District Court recognized that it needed to take one further step. It was obligated to apply the "short form test" of 29 C.F.R. §541.2 to determine whether Petitioner was exempt from the FLSA. This test required Respondent to prove that Petitioner's primary duty (1) "consist[ed] of either the performance of office . . . work directly related [Respondent's] management policies or general business operations . . . " and (2) "includ[ed] work requiring the exercise of discretion and independent judgment."

The District Court concluded that Petitioner's primary duty did not directly relate to Respondent's management policies or general business operations. It said in its findings:

> I know that even though the law is clear that he doesn't have to make the final decision himself, that sending information to others who will make the decision doesn't necessarily – can't necessarily mean that it's an administrative duty because just the purest bookkeepers could send numbers into the corporate or to the plant manager and it would be a basis of the final decision. You could say that he helped or she helped in the decision in that respect. (Appendix D-4)

The District Court obviously concluded that Petitioner's work, being no more related to Respondent's policies or operations than what any bookkeeper's work typically would be, was not sufficient to exempt him from the FLSA. As to whether his work required the exercise of

discretion and independent judgment, the District Court found that he did exercise such judgment, but weighing this against the "overall" nature of Petitioner's duties caused the District Court to determine that it was not sufficient to make him exempt.

The Eighth Circuit's misreading of the District Court's findings of fact is a far cry from the approach taken by the Fifth Circuit. In response to a similar charge that the trial court had ascertained primary duty by applying "a simple 'clock' standard," the court said:

> We cannot agree . . . with [the employer's] contention that the district court misconstrued the concept of primary duty. The district court did state in its opinion that "[p]rimary duty as defined in the regulations means the major part, or over fifty percent, of the employee's time." This court has made similar statements, but that does not mean that we misapplied the regulation. *After examining the district court's opinion and reviewing the record, we are convinced that the district court did not base its decision solely on the amount of time [the employer's] employees spend at various tasks.*

Dalheim v. KDFW-TV, 918 F.2d 1220, 1227 (1990) (emphasis added).

What is missing in the Eighth Circuit's decision is a proper examination of the District Court's opinion and affording it appropriate inferences in light of the record as mandated by Fed. R. Civ. P. 52(a). The Eighth Circuit merely had a different view of the evidence. A fact-finder's choice between two permissible views cannot be deemed clearly erroneous. *Anderson v. City of Bessemer*

City, North Carolina, 470 U.S. 564, 574 (1985). The Eighth Circuit clearly overstepped the acceptable bounds of Fed. R. Civ. P. 52(a).

III. The Eighth Circuit's decision misapplied the law by not putting Respondent to a standard of clear proof in establishing that petitioner was exempt and has enunciated new rules which significantly broaden the administrative exemption in contravention of the Secretary's regulations and the FLSA's purpose.

The unacceptable effect of the Eighth Circuit's decision is that an employer is entitled to the administrative exemption from the FLSA even when its employee spends 90 percent of his time doing routine work which is not directly related to management policies or general business operations and which is not directly related to administrative duties. This is in direct contravention of 29 U.S.C. §541.2 which requires that an employer establish that the employee's primary duty directly relate to management policies or general business operations. The Eighth Circuit's decision that Petitioner was not exempt from the FLSA rested only on a finding that the work Petitioner did was "vital" to Respondent. Contrary to this Court's teaching in *Arnold v. Ben Kanowski*, 361 U.S. 388, 392 (1960), that exemptions are to be narrowly construed, the Eighth Circuit's decision unduly broadens the administrative exemption.

The Eighth Circuit's decision stands for the proposition that when an employee performs an administrative-type duty which is "vital" to the employer, that duty is the employee's primary duty because it is of "principal

importance to the employer, rather than collateral tasks which may take up more than fifty percent of his or her time." (Appendix A-10) The Eighth Circuit found that the variance report prepared by Petitioner was a "scorecard" which was vitally important to Respondent's pricing decisions. The other important duties enumerated by the Eighth Circuit included Petitioner's attending management team meetings, serving as registered agent, signing a copier lease and a sales tax form, and computerizing the bookkeeping function. The last item occurred before the relevant time frame.

The law requires that before an employee is exempt from the FLSA, his or her work must *directly* relate to management policies or general business operation. 29 C.F.R. §541.202. An employee who performs routine work to gather information from which he or she will draw conclusions and render advice to management satisfies this requirement. 29 C.F.R. §541.205(4) and (5). On the other hand, "[a]n employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks." 29 C.F.R. §541.205(2). This defeats the exception for bookkeepers whose work may be important, even vital, to their employers for decision making, but the bookkeeper is not called upon to draw conclusions and to render advice.

In this case, the Eighth Circuit knew that Petitioner spent the vast majority of his time performing bookkeeping tasks which included the variance report, a document

showing current and previous production costs and performance. Although the Eighth Circuit placed great weight on Petitioner's preparation of this production report, it did not find that Petitioner did anything but gather, store, and put the data into accounting formats formulated by others. It did not make a finding that these bookkeeping functions were administrative in nature or were directly related to an administrative function.

The Eighth Circuit also erred in ignoring the dichotomy between production and administrative workers. The Fifth Circuit addressed this issue in *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230-31 (1990), in which the court examined the roles of assistant news producers who made daily decisions concerning the content and presentation of a television station's news. The Fifth Circuit held that the assistant producers actually were production-type workers, not administrative workers, because their work was directly related to producing their employer's product, not to management policies or general business operations. The Secretary, in interpreting §541.205(a), defines the "directly related" prong by distinguishing between the administrative operations of a business and production.

> Administrative operations include such duties as advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control.

Dalheim at 1230.

Most importantly, the "directly related" factor is a determination to be made by drawing inferences from the

facts as presented to the District Court. In *Dalheim* the Court states that "Whether an employee's work is or should be deemed 'directly related' to business operations is an inference drawn from the historical facts; we review such inferences for clear error." Just as in *Dalheim* where the Court stated that "the duties of a producer clearly related to the production of a KDFW news department product and not to defendant's administrative operations" (Id. at 1231), the duties of Spinden clearly related to the production of reports for GS Roofing Products and not to the company's administrative operations.

To the extent Petitioner provided the "scorecard" concerning Respondent's plant production or prepared other bookkeeping reports such as the sales tax form, he was providing services related to the production of Respondent's roofing materials. He was not engaging in work directly related to management policies or general business operations.

Indeed, all employees of a for-profit enterprise presumptively provide important functions. This, however, is not the proper focus for determining whether an employer has proven its entitlement to an exemption. The proper focus is whether "plainly and unmistakenly" the employee's duties directly relate to management policies or general business operations. *Arnold* at 392.

The import of the Eighth Circuit's decision has unacceptable implications for future determinations of an employee's primary duty. Its broadening of the administrative exemption will surely defeat the purposes of the FLSA by making the exemption hurdle a much easier one for employers to clear.

First, the Eighth Circuit has virtually rendered a nullity 29 C.F.R. §541.103's requirement that the relative importance of an employee's administrative duties be compared with his or her other duties. The Eighth Circuit has held that 10 percent of an employee's time spent doing administrative-type work important to an employer is sufficient as a matter of law, regardless of the type of work done in the remainder of his or her time.

Second, contrary to the lecture of the District Court that time alone is not a sufficient standard, the Eighth Circuit has made time alone a sufficient standard for judging an employee's exercise of discretion. The Eighth Circuit declared that, to its way of thinking, 10 percent constituted a frequent exercise of discretion. Rather than requiring factfinders to weigh the importance of the discretion exercised, as set out in C.F.R. §541.206, the Eighth Circuit has set its own "rule of thumb" that 10 percent is sufficient.

Third, contrary to the Secretary's instruction in 29 C.F.R. §541.207 that only meaningful and substantial exercise of discretion will satisfy the administrative exemption, the Eighth Circuit held that Petitioner satisfied this component without analysis of the significance of the matters in which discretion was exercised. Petitioner's discretion was minimized by the direction he was under from the local plant manager and other superiors at corporate headquarters. This holding countervails the Secretary's requirement that a factfinder determine the magnitude of an employee's discretion and independent judgment and whether it is sufficient under all the facts and circumstances. This requires weighing the discretion

used by the employee against that which an administrative employee typically would exercise. The Eighth Circuit not only did not make such an analysis, it ignored the large amount of discussion by the District Court concerning Petitioner's analysis and exercise of discretion.

Fourth, the Eighth Circuit's decision evidenced confusion of skills and abilities with actual duties performed. At trial, Respondent relied on a recitation of goals and skills from job descriptions as establishing Petitioner's duties. Respondent's expert acknowledged that he did not know what duties Petitioner actually performed. The Eighth Circuit listed many of these in its discussion of the facts without making a finding that the Petitioner actually performed them. Indeed, it ignored testimony by Respondent's corporate officers that Petitioner had no time to perform the duties, and they had no expectation that he perform them. The Eighth Circuit fails to make a common sense distinction between those duties an employer plans for its employee to do and what duties the employee actually does, and by doing so violates 29 C.F.R. §541.201(2). This is a matter of fact totally ignored by the Eighth Circuit in its usurpation of the District Court's factfinding role.

The impact of this case as precedent is untenable. The Eighth Circuit has provided employers a basis for asserting an exemption from the FLSA by setting up unenforced goals and skills which appear to be administrative and finding some arguably administrative-looking duty, such as preparation of a variance report, which it can identify as being important. This is a far cry from the narrow application mandated by this Court in *Arnold*.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 27, 1997

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1893

Paul O. Spinden, Appellee, v. GS Roofing Products Company, Inc., Appellant.	*	Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: April 8, 1996

Filed: August 22, 1996

Before MAGILL, Circuit Judge, HENLEY, Senior Circuit Judge, and LOKEN, Circuit Judge.

MAGILL, Circuit Judge.

GS Roofing Products Company, Inc. (GS) appeals the district court's ruling that GS's former controller, Paul O. Spinden, was not an exempt administrative employee under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-216. We reverse.

I.

Spinden worked as the plant controller for the GS plant in Little Rock, Arkansas, from January 1985 until September 1993. When Spinden first joined the company, he had an accounting clerk and an accounts payable clerk who reported to him. In December 1986, the clerks were terminated as part of a downsizing effort by GS, and Spinden took over their duties.[1] As a result of these additional duties, Spinden consistently worked longer than forty hours each week. Spinden received only his base salary and bonuses as compensation, however, which at the time of his retirement was $42,792 annually. Spinden brought this lawsuit against GS in August 1993, seeking overtime compensation for hours worked in excess of forty hours per week for the last two years of his employment with GS.[2]

In its defense against Spinden's claim for overtime wages, GS argued that Spinden was exempt from the FLSA's overtime compensation provisions because he was an administrative employee under the definition provided by the FLSA's enabling regulations. Both Spinden

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[1] While GS never replaced Spinden's permanent assistants, it did occasionally employ temporary employees who assisted Spinden in his work. Spinden denies that he directly supervised these temporary employees.

[2] Spinden's claim for overtime compensation was tried by the district court in a bench trial. Spinden also brought a suit under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, alleging age discrimination by GS. The discrimination suit was simultaneously tried before a jury, which found for GS. Spinden does not appeal this adverse verdict.

and GS submitted evidence which described Spinden's duties at GS. GS relied, in part, on Spinden's own resume, which summarized his work at GS:

* Provided accurate and timely financial reporting, including accounts payable, inventory, cash receipts and disbursements, journal and bank account reconciliation, production and variance report
* Posted daily, weekly, and monthly production, including downtime and loss time
* Maintained personnel records
* Prepared hourly payroll
* Prepared quarterly and annual federal and state tax reports, including multi-state reports
* Managed cash flow
* Prepared annual budgets for plant operation and for all departments
* Analyzed standard/actual cost for all production
* Responsible for obtaining and maintaining all employee insurance
* Prepared monthly journal entries
* Maintained general ledger

Def. Ex. 1, *reprinted in* Appellant's App. at 34.

GS presented evidence that Spinden regularly created a variety of reports, including the Variance Report. The Variance Report measured the Little Rock plant's actual monthly performance against its projected monthly performance; where actual costs exceeded projected costs, a negative variance existed. Spinden acknowledged that when he noted negative variances, he "might say something [to the plant manager], because in the course of

setting up the standard, we may have set the standard up a little bit too low." Trial Tr. at 364.

In addition, GS presented a "Performance Improvement Plan," signed by Spinden and dated March 2, 1992, which listed "performance criteria (knowledge, skill, and other personal factors critical to job success)" for Spinden's position:

> Must be able to determine the best way to program all schedules for timely reporting.
>
> Must have accounting skills and knowledge of accounting principles and practices.
>
> Th[o]rough knowledge of GS Roofing Products Co. needs and requirements to stay abreast of all changes from Corporate Office.
>
> *Ability to analyze, process, interpret and effectively communicate cost data.*

Def. Ex. 18, *reprinted in* Appellant's App. at 47 (emphasis added). The plan also described several "key job objectives":

> Work with Admin Ass't to develo[p] a method to balance and audit Distribution Trial Balance Summary Report on monthly basis . . .
>
> Design a Cost Reduction Reporting Form that will generate all data needed to accurately report savings . . .
>
> Work with Production Superintendent to develop plan and implement[at]ion schedule for computerizing production and usage reporting on a daily basis . . .

Id.

GS also presented evidence that Spinden had been responsible for computerizing the accounting procedures at the Little Rock plant; that Spinden met with the Little Rock GS plant manager, production superintendent, traffic manager, process engineer, and corporate process engineer for weekly staff meetings, *see* Trial Tr. at 524 (Spinden Testimony); that Spinden was, upon his own recommendation, responsible for accepting service of process as the registered agent for GS in Little Rock, *see id.* at 463; that Spinden signed documents from the city of Little Rock Revenue Collection Division for GS, thereby agreeing that he was an "owner, officer or manager" of GS, *see* Appellant's App. at 52; and that Spinden signed equipment leasing contracts for GS. *See id.* at 54.

Spinden testified at trial that most of his time was occupied by

> [j]ust a bunch of number crunching and basically doing all the accounting work as far as clerical work that had to be done getting production reports and putting in production and the time sheets and time cards and just menial, everyday bookkeeping jobs.

Trial Tr. at 523 (Spinden Testimony). During his cross-examination, Spinden testified regarding his other duties at GS:

> Q. Mr. Spinden, in your controller job from 1987 until 1993, your duties included the following things, correct, and I'm going to list them for you: Accountable for the timely and accurate reporting of manufacturing costs and variances?
>
> A. Yes.

Q. Experience in a manufacturing environment with emphasis on standard costing, variance analysis, and the corollary disciplines of accounting normally associated with the maintenance of a general ledger?

A. No.

Q. You don't believe that that was one of your responsibilities?

A. Not analysis. I did not have time to do analysis.

. . .

Q. All right. Did you give the following answer [during your deposition on April 26, 1994] to the following question:

> . . . "Now, No. 2, three to five years' experience in a manufacturing environment with emphasis on standard cost variance analysis and corollary disciplines of accounting normally associated with maintenance of a general ledger. Would you agree that the plant controller – as plant controller at GS Roofing, that these were skills that you used as plant controller and skills that you possess?"

"Answer: Yes."

Did you give that answer at that time?

A. I may have.

Trial Tr. at 452-54. Spinden also agreed that he: reconciled the payroll bank account and audited weekly payroll earnings and deductions; prepared journal entries for the recording of accounts payable accruals, liabilities associated with the hourly payroll, conception of raw materials

and related variances; scrutinized all production and inventory dates to insure accuracy, policy compliance, and control; and developed systems/programs which reduced clerical effort and improved office productivity. *Id.* at 457-60.

The district court concluded that Spinden was not an exempt employee, and was therefore entitled to overtime compensation. The court stated:

> [This case] comes down to the, as everyone agrees, what [Spinden's] primary duty was. . . . I think these concepts are a little slippery. So when I first heard about that 50 percent rule, a good rule of thumb . . . I figured, well, that will give me something I can tie to. Then I hear about the *Burger King* case [3] that's 90 percent and they go for managerial or administrative or whichever. . . .
>
> This case is so close that I'm still making up my mind as I'm talking in my opinion. . . .
>
> But it seems to me that primary duty has to have some tie in some way in most cases to amount of time spent on a particular duty. Now, if it were 50 percent, I could easily find in Mr. Spinden's case because I think clearly that more than 50 percent of his time was spent in doing things, what I'd call mere bookkeeping or things that I would not call discretionary or decision making or management-type decisions. On the

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[3] It is unclear whether the district court referred to *Donovan v. Burger King Corp.*, 675 F.2d 516 (2d Cir. 1982) (*Burger King* II), or *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982) (*Burger King* I). Both cases involved the same essential facts, and arrived at the same legal conclusions.

other hand, if we went with the *Burger King* case on 90 percent, I might be inclined clearly to go the other way.

I do think the *Burger King* case is distinguishable because I think somebody that is a manger [sic] or supervisor in a fast food place really can be the manager and spend most of his time doing – cooking hamburgers and dipping french fries and doing that sort of thing and still have a finger on the pulse of everything, still be directing everything and probably doesn't have to do much directing when he's got trained employees. I don't think that that is a very close analogy. I think it was Holmes who said, "All similes limp," and so I don't think that's a very close analogy.

So I get back to, well, how much time under all the facts of this case do I think that Mr. Spinden spent doing primarily what I'd call administrative, more managerial, decision making, discretion, independent judgment-type things. I know that even though the law is clear that he doesn't have to make the final decision himself, that sending information to others who will make the decision doesn't necessarily – can't necessarily mean that it's an administrative duty because just the purest bookkeepers could send numbers into the corporate or to the plant manager and it would be a basis of the final decision. You could say that he helped or she helped in the decision in that respect.

Well, my overall impression is – and when I say "overall impression," I mean my opinion is that Mr. Spinden spent about 80 to 90 percent in nonexempt work. Well, is that enough to make

> him nonexempt under all the facts and circumstances of the case? And I find that it is. I find him nonexempt, the 80 to 90 percent. So I'm going to make a specific finding of fact that in my opinion that he did about 80 to 90 percent of nonexempt work and, conversely, the other percentage would be what would normally be exempt work.
>
> I think that clearly that Mr. Spinden did more exempt work than his testimony in his view he did, but I don't find that he did much more. I've got to tie it in some way to how much he did and how important it was. I just don't get the overall impression that he was much more than a bookkeeper. He was something more but not enough for me to find that that was his primary duty, and so that will be the finding of the Court on that.

Trial Tr. at 1148-51. The district court supplemented this finding during a subsequent telephonic conference with the parties:

> I want to make one comment on the finding I made that Mr. Spinden was not an administrative person under the exception. I am even more confident of my finding as I have reflected on the trial and the evidence. I feel, as I stated earlier, he probably did do about ten to twenty percent, probably about fifteen percent work which would probably be called administrative. Just for example, he took over the work of two employees who undeniably did nothing other than clerical, bookkeeping type work. So, I think he was basically your garden variety bookkeeper with a few administrative duties.

> So, bottomline, when viewed as a whole I do not believe he was an administrative employee as defined by the statute and the regulations.

Conference of March 9, 1995 Tr. at 5-6.

The district court also found that GS and Spinden had agreed that his salary was for forty hours per week, and that Spinden was entitled to one-and-a-half times his normal rate of pay for hours worked over forty. The district court entered a judgment for Spinden for $54,507.28, plus $5,028.86 in simple interest from September 15, 1993 through March 9, 1995, plus postjudgment interest at a rate of 6.57 percent until paid, and awarded Spinden attorney's fees. GS now appeals, arguing that the district court erred in (1) concluding that Spinden was a nonexempt employee; (2) finding that there was an agreement between the parties that Spinden's salary was for a forty-hour week; and (3) calculating Spinden's overtime wages at one-and-a-half times his base rate of pay.[4]

II.

A.

We review the district court's findings of fact for clear error, *see* Fed. R. Civ. P. 52(a), and its legal conclusions de novo. *See Reich v. Avoca Motel Corp.*, 82 F.3d 238, 240 (8th Cir. 1996). "A finding is 'clearly erroneous' when

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[4] Spinden has moved to dismiss GS's appeal on the ground that GS failed to provide a complete record. We deny this motion. GS has countermoved for sanctions against Spinden, for what it considers a frivolous motion. This motion is also denied.

although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In an FLSA exemption analysis, "the amount of time devoted to administrative duties, and the significance of those duties, present factual questions." *Avoca*, 82 F.3d at 240 (quotations and citations omitted). The ultimate question, however, of "whether [employees'] particular activities excluded them from the overtime benefits of the FLSA is a question of law . . . governed by the pertinent regulations promulgated by the Wage and Hour Administrator." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

B.

Under the FLSA, employees are entitled to additional compensation for working more than forty hours in a week. *See* 29 U.S.C. § 207(a). Bona fide administrative employees, however, are exempt from this provision, and are not entitled to additional compensation. *See* 29 U.S.C. § 213(a)(1). This exemption is "narrowly construed in order to further Congress' goal of providing broad federal employment protection." *McDonnell v. City of Omaha, Neb.*, 999 F.2d 293, 295 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1188 (1994). The burden is on the employer to prove that this exemption applies by "demonstrat[ing] that their employees fit 'plainly and unmistakably within the exemption's terms and spirit.' " *McDonnell*, 999 F.2d at 296 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

Different tests apply to determine if an employee is qualified for the administrative exemption, depending on the employee's level of compensation. Where, as in Spinden's case, an employee earns more than $250 per week, the "short test" applies. *See Shockley v. City of Newport News*, 997 F.2d 18, 28 (4th Cir. 1993). Under the short test, an employee qualifies for the administrative exemption if his "primary duty consists of the performance of [office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers], which includes work requiring the exercise of discretion and independent judgment." 29 C.F.R. § 541.2(e)(2) (incorporating 29 C.F.R. § 541.2(a)(1)).

Regulations at 29 C.F.R. § 541.103, incorporated by 29 C.F.R. § 541.206(b), define "primary duty" for this exemption:

> A determination of whether an employee has [administration] as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the [administrative] duties is a useful guide in determining whether [administration] is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in [administration] would have [administration] as his primary duty. *Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in [administrative] duties, he might nevertheless have [administration] as his primary duty if the other pertinent factors support such a conclusion.*

> Some of these pertinent factors are the relative importance of the [administrative] duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the [administrator].

(emphasis added). Under these regulations, therefore, an "employee's primary duty is that which is of principal importance to the employer, rather than collateral tasks which may take up more than fifty percent of his or her time." *Reich v. Wyoming*, 993 F.2d 739, 742 (10th Cir. 1993).

In concluding that Spinden did not have administration as his primary duty as GS's employee, the district court relied entirely on its finding that 80 to 90 percent of Spinden's tasks were routine and nondiscretionary in nature. *See* Trial Tr. at 1148-51; Conference Tr. at 5-6. The district court did not conduct the analysis set out in 29 C.F.R. § 541.103, which applies when the 50 percent "rule of thumb" is inapplicable. While we accept the district court's finding that only 10 to 20 percent of Spinden's duties involved discretion, we must reject as clearly erroneous its finding that administration was not Spinden's primary duty.

As the regulations make clear, the percentage of time an employee spends on administrative tasks is but one factor in determining if administration is that employee's primary duty. In *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 618 (8th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992), we held that the fact that an employee spent 65 to 90 percent

of his time on nonexempt tasks "is not a controlling factor under the regulations" for determining whether the employee was exempt from the FLSA's overtime provisions. *See also Jones v. Tiller*, 72 F.3d 138, 1995 WL 712674, *3 (10th Cir. 1995) (unpublished opinion) (employee who spent 90 percent of her time on nonexempt tasks qualified for administrative exemption); *Burger King* II, 675 F.2d at 521 (analyzing primary duty where 50 percent rule of thumb was inapplicable); *Burger King* I, 672 F.2d at 226-27 (same).

Applying the proper analysis to the facts of this case, we conclude that Spinden's primary duty as controller of GS's Little Rock plant[5] consisted of the performance of office work directly related to the management policies or the general business operations of GS. Viewing the record as a whole, we must therefore conclude that the district court's finding that Spinden "was basically your garden variety bookkeeper with a few administrative duties," Conference Tr. at 6, was clearly erroneous.[6]

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[5] While it may be true that "a controller or comptroller would necessarily have a primary duty directly related to management policies or general business operations," *Clark v. J.M. Benson Co.*, 789 F.2d 282, 285 (4th Cir. 1986) (paraphrasing district court), we agree that "[a] title alone is of little or no assistance in determining the true importance of an employee to the employer or his exempt or nonexempt status." 29 C.F.R. § 541.201(b)(1). Rather than using Spinden's controller title as a yardstick, the proper analysis is "whether his duties, responsibilities, and salary meet all the requirements" for the exemption. 29 C.F.R. § 541.201(b)(2).

[6] It is true that Spinden did complete bookkeeping tasks as part of his overall duties, and that these tasks occupied much of his time after downsizing limited his accounting staff to

Unlike any bookkeeper, Spinden was a member of the Little Rock plant's management team, and participated in weekly meetings with senior management personnel. At these meetings, Spinden and the others discussed issues of importance to GS, including opening a new production line at the Little Rock plant. *See* Trial Tr. at 379-81 (Spinden Testimony). In addition, Spinden's administrative duties included serving as the registered agent for service of process, computerizing the Little Rock plant's accounting procedures, and signing contracts and tax documents. Perhaps most significantly, Spinden created Variance Reports for GS, which acted as a "score card" for the Little Rock plant. *See* Trial Tr. at 770 (Testimony of Tom Smith, Little Rock plant manager). Spinden agrees that the Variance Reports were "vital to pricing and production information." Appellee's Br. at 10. Spinden's role in this area strikes this Court as extremely similar to the example of an exempt statistician provided by the regulations:

> Some firms employ persons whom they describe as "statisticians." If all such a person does, in effect, is to tabulate data, he is clearly not exempt. However, if such an employee *makes analyses of data and draws conclusions which are important to the determination of, or which, in fact, determine financial, merchandising, or other policy,*

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occasional temporary employees. We conclude, however, that merely because Spinden took on additional clerical tasks does not necessarily mean that his primary duty became clerical in nature.

> *clearly he is doing work directly related to management policies or general business operations.*

29 C.F.R. § 205(c)(3) (emphasis added).[7]

The other elements of the primary duty analysis also support our conclusion that Spinden was an administrative employee. Spinden engaged in discretionary duties at least 10 to 20 percent of the time, which we hold constitutes a frequent exercise of discretionary duties under the regulations. *See, e.g., Jones*, 72 F.3d 138, 1995 WL 712674, at *3; *Stuckey's*, 939 F.2d at 618. In 1993, Spinden was the third highest paid employee of the Little Rock plant, earning more than every other employee except for the plant manager and the plant superintendent,[8] and his salary far outpaced that of purely clerical employees who otherwise would have carried out Spinden's bookkeeping duties. *See* Appellant's App. at 133. Spinden acknowledges that employees receiving less compensation than he were clearly exempt. *See* Trial Tr. at 524-25; Appellant's App. at 133. It is clear from the record that Spinden was not only the chief financial employee of the Little Rock plant, but that he was essentially a one-

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[7] In addition, the specific objectives listed in Spinden's Performance Improvement Plan for Spinden to achieve involved the design and development of accounting reports and methods, quintessential administrative tasks. *See* Appellant's App. at 47.

[8] Spinden earned $42,792 in 1993, while the plant manager, the highest paid individual at the Little Rock plant, earned $65,208 that year. *See* Pl. Ex. 36, *reprinted in* Appellant's App. at 141. We note that, if Spinden were to be paid the more than $27,000 per year in overtime which the district court's judgment provides, he would, as a nonexempt employee, be the *highest* paid person at the plant.

man department, receiving only occasional assistance. As such, Spinden was not directly supervised by any financial officer at the Little Rock plant, but rather received direction only from the plant manager at the Little Rock plant and the corporate office. *See* Appellee's App. at 63 (organizational chart of Little Rock plant); Trial Tr. at 456 (Spinden's testimony that he received direction from corporate office).

C.

Spinden has also met the second prong of the short test: as the district court found, he spent 10 to 20 percent of his time "doing primarily what I'd call administrative, more managerial, decision making, discretion, independent judgment-type things." Trial Tr. at 1150. The term "discretion and independent judgment" is defined in the regulations at 29 C.F.R. § 541.207:

> (a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term . . . implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. . . .
>
> [(e)(1)] The term "discretion and independent judgment" . . . does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and

> independent judgment may consist of recommendations for action rather than the actual taking of action. . . .

See also Dymond v. United States Postal Serv., 670 F.2d 93, 96 (1982) ("Even though an employee's work is subject to approval, even to the extent that a decision may be reversed by higher level management, it does not follow that the work did not require the exercise of discretion and independent judgment as the terms are defined for the administrative employee exemption."). In addition to his analytical duties, such as making suggestions to senior management about negative variances in the Variance Report, *see* Trial Tr. at 364, Spinden made recommendations about the need for additional personnel, *see id.* at 380, and about terminating personnel. *See id.* at 378. We agree that Spinden spent at least 10 to 20 percent of his time engaged in discretionary duties, which adequately fulfills this element of the short test. *See, e.g., Dymond*, 670 F.2d at 95 (under short test, employees "qualify for the administrative employee exemption if they meet the more liberal standard requiring that their duties merely 'include' work requiring the exercise of discretion and independent judgment").

In light of the entire record in this case, and with "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses," Fed. R. Civ. P. 52(a), we reverse the district court for clear error, and hold that GS has met its burden of proving that Spinden fits "plainly and unmistakably within the [administrative] exemption's terms and spirit." *McDonnell*, 999 F.2d at 296 (quotations and citation omitted).

III.

Because we hold that Spinden was an exempt administrative employee under the FLSA, he is not entitled to overtime compensation. Because we reverse on this ground, we need not reach GS's other arguments. Accordingly, we reverse the district court's judgment and award of attorney's fees.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-1893EALR

Paul O. Spinden,	*	Order Denying Petition
	*	for Rehearing and
Appellee,	*	Suggestion for Rehearing
vs.	*	En Banc
	*	
GS Roofing Products Company, Inc.,	*	
	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 30, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1893EALR

Paul O. Spinden,	*	Order Denying Petition
	*	for Rehearing and
Appellee,	*	Suggestion for Rehearing
	*	En Banc
vs.	*	
	*	
GS Roofing Products Company, Inc.,	*	
	*	AMENDED ORDER
Appellant.	*	

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion. The petition for rehearing by the panel is also denied.

November 4, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

[p. 885] IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PAUL O. SPINDEN,

Plaintiff,

vs. No. LR-C-93-566

GS ROOFING PRODUCTS COMPANY, INC., Monday, February 27, 1994 [sic]

Defendant. Little Rock, Arkansas
8:52 a.m.

TRANSCRIPT OF TRIAL
VOLUME 5 (Pages 885 - 1179)
BEFORE THE HONORABLE WILLIAM R. WILSON, JR.,
UNITED STATES DISTRICT JUDGE, and a jury

APPEARANCES:

On Behalf of the Plaintiff:
MS. JANET L. PULLIAM, Attorney at Law
MS. DENISE HOGGARD, Attorney at Law
Pulliam Law Office, P.A.
103 West Capital Avenue, Penthouse Suite
Little Rock, Arkansas 72201

On Behalf of the Defendant:
MR. JOSEPH M. ENGLISH, Attorney at Law
MR. JAMES C. POLKINGHORN,
Attorney at Law
Fisher & Phillips
Resurgens Plaza
945 East Paces Ferry Road, Suite 1500
Atlanta, Georgia 30326-1125

Proceedings reported by machine stenography; transcript prepared by computer-aided transcription.

* * *

Closing – Plaintiff

[p. 1148] But this plaintiff did number crunching, he put those numbers into formats that were provided for him. He was told when to do it, he was told how to do it. He didn't exercise discretion.

THE COURT: Thank you. Have I heard you all out on this issue?

MR. POLKINGHORN: Yes, your Honor.

MS. HOGGARD: Yes.

THE COURT: I made some notes on some cases I've read here and some of these regulations I'm – well, of course, it comes down to the, as everyone agrees, what the primary duty was. I had hoped that as in most cases, I can take one set of facts on one side or the other or one expert or the other and have a pretty clear picture of the answer. I guess I like to be convinced by clear and convincing evidence or beyond a reasonable doubt rather than by a preponderance, and so in this case, I was frankly impressed with both experts. They've got a lot of experience. They were well spoken. I did not find that either one of them was particularly an advocate, except to the extent that they had a healthy respect for their own opinions, which I admire in someone. I am satisfied by studying their demeanor both of them are equally satisfied that they're right.

I think this points up one of my problems, that I think these concepts are a little slippery. So when I first heard about that 50 percent rule, a good rule of thumb, that really [p. 1149] gave me a rush because I figured,

well, that will give me something I can tie to. Then I hear about the *Burger King* case that's 90 percent and they go for managerial or administrative or whichever, whatever the exception was, the *Burger King* case. Incidentally, I read that case, but hurriedly.

This case is so close that I'm still making up my mind as I'm talking in my opinion, in my view of it.

I guess the bottom line is, both experts and the lawyers taught me a lot more about this law than I ever though I'd know, but I don't know that they've – that I've been stricken on the Damascus road and seen the light.

But it seems to me that primary duty has to have some tie in some way in most cases to amount of time spent on a particular duty. Now, if it were 50 percent, I could easily find in Mr. Spinden's case because I think clearly that more than 50 percent of his time was spent in doing things, what I'd call mere bookkeeping or things that I would not call discretionary or decision making or management-type decisions. On the other hand, if we went with the *Burger King* case on 90 percent, I might be inclined clearly to go the other way.

I do think the *Burger King* case is distinguishable because I think somebody that is a manager or supervisor in a fast food place really can be the manager and spend most of his time doing – cooking hamburgers and dipping french fries and doing that sort of thing and still have a finger on the pulse of [p. 1150] everything, still be directing everything and probably doesn't have to do much directing when he's got trained employees. I don't think that that is a very close analogy. I think it was

Holmes who said, "All similes limp," and so I don't think that's a very close analogy.

So I get back to, well, how much time under all the facts of this case do I think that Mr. Spinden spent doing primarily what I'd call administrative, more managerial, decision making, discretion, independent judgment-type things. I know that even though the law is clear that he doesn't have to make the final decision himself, that sending information to others who will make the decision doesn't necessarily – can't necessarily mean that it's an administrative duty because just the purest bookkeepers could send numbers into the corporate or to the plant manager and it would be a basis of the final decision. You could say that he helped or she helped in the decision in that respect.

Well, my overall impression is – and when I say "overall impression," I mean my opinion is that Mr. Spinden spent about 80 to 90 percent in nonexempt work. Well, is that enough to make him nonexempt under all the facts and circumstances of the case? And I find that it is. I find him nonexempt, the 80 to 90 percent. So I'm going to make a specific finding of fact that in my opinion that he did about 80 to 90 percent of nonexempt work and, conversely, the other percentage would be [p. 1151] what would normally be exempt work.

I think that clearly that Mr. Spinden did more exempt work than his testimony in his view he did, but I don't find that he did much more. I've got to tie it in some way to how much he did and how important it was. I just don't get the overall impression that he was much more than a bookkeeper. He was something more but not

enough for me to find that that was his primary duty, and so that will be the finding of the Court on that.

Now, we come to the issue of damages. I would like to ask for comments from both counsel, if anybody is inclined. I am still entirely undecided on whether we go with the time and half or half time. I'd also like to hear the defendant's view of the plaintiff's damage chart, assuming that I did go with the time and a half, but I'll let the plaintiff start off. Take about four or five minutes and tell me why I should go with the time and a half.

MS. HOGGARD: Your Honor, on Plaintiff's Exhibit No. 27, once there is a finding that someone is a nonexempt employee, the defendant's own policy says that all nonexempt employees will have their overtime computed at the basis of one and one-half times their rate of pay.

THE COURT: And what is that you're referring to now?

MS. HOGGARD: This is the defendant's nonexempt time reporting, which is Plaintiff's Exhibit No. 27.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PAUL O. SPINDEN	:	NO. LR-C-93-566
Plaintiff	:	2:00 p.m. March 9, 1995
vs.	:	
GS ROOFING PRODUCTS, INC.	:	Little Rock, Arkansas
Defendant	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FROM THE PROCEEDINGS BEFORE THE HONORABLE WILLIAM R. WILSON, UNITED STATES DISTRICT JUDGE, as follows:

APPEARANCES:

On Behalf of the Plaintiff:

JANET PULLIAM
103 West Capitol Avenue-Penthouse Suite
Little Rock, Arkansas 72201

On Behalf of the Defendant:

STEVEN SHULTS
200 West Capitol Avenue-Suite 1600
Little Rock, Arkansas 72201

(Pages 1-10)

* * *

[p. 5] apply to compute plaintiff's regular rate of pay based on all hours worked in a given week. After mature reflection, and I underline the word "mature," I find,

although the evidence is somewhat sparse, it preponderates, albeit slightly, in favor of a forty-hour agreement. I rely on the totality of circumstances of the evidence on this point. I might particularly point out the plaintiff's testimony and Mr. Gnann's testimony. As I have stated before and as you know, he went – Let me spell Gnann here for the court reporter who is new to this case – I think it is G-n-a-n-n.

Is that correct?

MS. PULLIAM: Yes, Your Honor, it is.

THE COURT: Mr. Gnann, portions of his deposition were read into evidence on this, and while he wavered a little bit on this, at bottom he agreed that a forty-hour week was the policy. There was a document introduced – I don't remember the title or the number of it right now – but it referred to a forty-hour week, but it appeared on its face to apply primarily to normal hourly rate employees. So, I don't give it much weight, although I might give it a smithereen of weight since there was no other document applying anything other than a forty-hour week.

I want to make one comment on the finding I made that Mr. Spinden was not an administrative person under the exception. I am even more confident of my finding as I have reflected on the trial and the evidence. I feel, as I stated earlier, he probably [p. 6] did do about ten to twenty percent, probably about fifteen percent work which would probably be called administrative. Just for example, he took over the work of two employees who undeniably did nothing other than clerical, bookkeeping

type work. So, I think he was basically your garden variety bookkeeper with a few administrative duties.

So, bottomline, when viewed as a whole I do not believe he was an administrative employee as defined by the statute and the regulations.

Now, I am going to try to calculate the rate of pay, plaintiff's regular rate of pay. I am going to do that by dividing plaintiff's regular rate of pay – Let me start that over again.

I will calculate plaintiff's regular rate of pay by dividing plaintiff's weekly salary by forty hours. I will award the plaintiff one and one-half times this regular rate of pay for overtime work in each week, plus pre-judgment interest at the rate of six percent compounded weekly up to the date of plaintiff's last paycheck, and six percent simple interest thereafter. Defendant indicated it has no objection to plaintiff's calculation of damages, other than it objects to me doing the time and a half and it asked for half time or no overtime at all. As far as the totalization itself, the calculation itself, defendant has indicated it has no objection, as I understand it. So, I adopt plaintiff's calculations and

* * *

APPENDIX E

§ 541.1 Executive.

* * *

(f) Who is compensated for his services on a salary basis at a rate of not less than $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 (or $180 per week beginning February 13, 1981 and $200 per week beginning February 13, 1983. If employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: PROVIDED. That an employee who is compensated on a salary basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 (or $250 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

§ 541.2 Administrative.

The term *employee employed in a bona fide* * * * *administrative* * * * *capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week ($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided,* That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week ($200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

[38 FR 11390. May 7, 1973, as amended at 40 FR 7092. Feb. 19, 1975]

EFFECTIVE DATE NOTE: Paragraph (e) in § 541.2 was revised at 46 FR 3013. Jan 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972. Feb. 12, 1981.

The text of paragraph (e) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.2 Administrative.

* * *

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 ($180 per week beginning February 13, 1981 and $200 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided,* That an employee who is compensated on a salary or fee basis at a rate of not less than #320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 ($260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

* * *

§ 541.103 Primary duty.

A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. For example, in some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-

day operations require. He will be considered to have management as his primary duty. In the data processing field an employee who directs the day-to-day activities of a single group of programers [sic] and who performs the more complex or responsible jobs in programing will be considered to have management as his primary duty.

* * *

§ 541.202 Categories of work.

(a) The work generally performed by employees who perform administrative tasks may be classified into the following general categories for purposes of the definition: (This classification is without regard to whether the work is manual or nonmanual. The problem of manual work as it affects the exemption of administrative employees is discussed in § 541.203.) (1) The work specifically described in paragraphs (a), (b), and (c) of § 541.2; (2) routine work which is directly and closely related to the performance of the work which is described in paragraphs (a), (b), and (c) of § 541.2; and (3) routine work which is not related or is only remotely related to the administrative duties. (As used in this subpart the phrase "routine work" means work which does not require the exercise of discretion and independent judgment. It is not necessarily restricted to work which is repetitive in nature.)

(b) The work in category 1, that which is specifically described in § 541.2 as requiring the exercise of discretion and independent judgment, is clearly exempt in nature.

(c) Category 2 consists of work which if separated from the work in category 1 would appear to be routine, or on a fairly low level, and which does not itself require the exercise of discretion and independent judgment, but which has a direct and close relationship to the performance of the more important duties. The directness and closeness of the relationship may vary depending upon the nature of the job and the size and organization of the establishment in which the work is performed. This "directly and closely related" work includes routine work which necessarily arises out of the administrative duties, and the routine work without which the employee's more important work cannot be performed properly. It also includes a variety of routine tasks which may not be essential to the proper performance of the more important duties but which are functionally related to them directly and closely. In this latter category are activities which an administrative employee may reasonably be expected to perform in connection with carrying out his administrative functions including duties which either facilitate or arise incidentally from the performance of such functions and are commonly performed in connection with them.

(d) These "directly and closely related" duties are distinguishable from the last group, category 3, those which are remotely related or completely unrelated to the more important tasks. The work in this last category is non-exempt and must not exceed the 20-percent limitation for nonexempt work (up to 40 percent or service establishment) if the exemption is to apply.

(e) Work performed by employees in the capacity of "academic administrative" personnel is a category of

administrative work limited to a class of employees engaged in academic administration as contrasted with the general usable of "administrative" in the act. The term "academic administrative" denotes administration relating to the academic operations and functions in a school rather than to administration along the lines of general business operations. Academic administrative personnel are performing operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration. Examples of jobs in school systems, and educational establishments and institutions, which are outside the term academic administration are jobs relating to building management and maintenance, jobs relating to the health of the students and academic staff such as social workers, psychologist, lunch room manager, or dietitian. Employees in such work which is not considered academic administration may qualify for exemption under other provisions of § 541.2 or under other sections of the regulations in subpart A of this part provided the requirements for such exemptions are met.

§ 541.203 Nonmanual work.

(a) The requirement that the work performed by an exempt administrative employee must be office work or nonmanual work restricts the exemption to "white-collar" employees who meet the tests. If the work performed is "office" work it is immaterial whether it is manual or nonmanual in nature. This is consistent with the intent to include within the term "administrative" only employees who are basically white-collar employees since the accepted usage of the term "white-collar" includes all

office workers. Persons employed in the routine operation of office machines are engaged in office work within the meaning of § 541.2 (although they would not qualify as administrative employees since they do not meet the other requirements of § 541.2).

(b) Section 541.2 does not completely prohibit the performance of manual work by an "administrative" employee. The performance by an otherwise exempt administrative employee of some manual work which is directly and closely related to the work requiring the exercise of discretion and independent judgment is not inconsistent with the principle that the exemption is limited to "white-color" employees. However, if the employee performs so much manual work (other than office work) that he cannot be said to be basically a "white-collar" employee he does not qualify for exemption as a bona fide administrative employee, even if the manual work he performs is directly and closely related to the work requiring the exercise of discretion and independent judgment. Thus, it is obvious that employees who spend most of their time in using tools, instruments, machinery, or other equipment, or in performing repetitive operations with their hands, no matter how much skill is required, would not be bona fide administrative employees within the meaning of § 541.2. An office employee, on the other hand, is a "white-collar" worker, and would not lose the exemption on the grounds that he is not primarily engaged in "nonmanual" work, although he would lose the exemption if he failed to meet any of the other requirements.

§ 541.205 Directly related to management policies or general business operations.

(a) The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

(b) The administrative operations of the business include the work performed by so-called white-collar employees engaged in "servicing" a business as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. An employee performing such work is engaged in activities relating to the administrative operations of the business notwithstanding that he is employed as an administrative assistant to an executive in the production department of the business.

(c) As used to describe work of substantial importance to the management or operation of the business, the phrase "directly related to management policies or general business operations" is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those work

affects policy or whose responsibility it is to execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.

(1) It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business. It should be clear that the cashier of a bank performs work at a responsible level and may therefore be said to be performing work directly related to management policies or general business operations. On the other hand, the bank teller does not. Likewise it is clear that bookkeepers, secretaries, and clerks of various kinds hold the run-of-the-mine positions in any ordinary business and are not performing work directly related to management policies or general business operations. On the other hand, a tax consultant employed either by an individual company or by a firm of consultants is ordinarily doing work of substantial importance to the management or operation of a business.

(2) An employee performing routing clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks. A messenger boy who is entrusted with carrying large sums of money or securities cannot be said to be doing work of importance to the business even though serious consequences may flow from his neglect.

An employee operating very expensive equipment may cause serious loss to his employer by the improper performance of his duties. An inspector, such as, for example, an inspector for an insurance company, may cause loss to his employer by the failure to perform his job properly. But such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be "directly related to management policies or general business operations" as that phrase is used in § 541.2.

(3) Some firms employ persons whom they describe as "statisticians." If all such a person does, in effect, is to tabulate data, he is clearly not exempt. However, if such an employee makes analyses of data and draws conclusions which are important to the determination of, or which, in fact, determine financial, merchandising, or other policy, clearly he is doing work directly related to management policies or general business operations. Similarly, a personnel employee may be a clerk at a hiring window of a plant, or he may be a man who determines or effects personnel policies affecting all the workers in the establishment. In the latter case, he is clearly doing work directly related to management policies or general business operations. These examples illustrate the two extremes. In each case, between these extreme types there are many employees whose work may be of substantial importance to the management or operation of the business, depending upon the particular facts.

(4) Another example of an employee whose work may be important to the welfare of the business is a buyer of a particular article or equipment in an industrial plant or personnel commonly called assistant buyers in retail or

service establishments. Where such work is of substantial importance to the management or operation of the business, even though it may be limited to purchasing for a particular department of the business, it is directly related to management policies or general business operations.

(5) The test of "directly related to management policies or general business operations" is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, claim agents and adjusters, wage-rate analysts, tax experts, account executives of advertising agencies, customers' brokers in stock exchange firms, promotion men, and many others.

(6) It should be noted in this connection that an employer's volume of activities may make it necessary to employ a number of employees in some of these categories. The fact that there are a number of other employees of the same employer carrying out assignments of the same relative importance or performing identical work does not affect the determination of whether they meet this test so long as the work of each such employee is of substantial importance to the management or operation of the business.

(7) In the data processing field some firms employ persons described as systems analysts and computer programers [sic]. If such employees are concerned with the planning, scheduling, and coordination of activities which are required to develop systems for processing data to obtain solutions to complex business, scientific, or engineering problems of his employer or his employer's

customers, he is clearly doing work directly related to management policies or general business operations.

(d) Under § 541.2 the "management policies or general business operations" may be those of the employer or the employer's customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers. Such employees, if they meet the other requirements of § 541.2, qualify for exemption regardless of whether the management policies of general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer.

§ 541.206 Primary duty.

(a) The definition of "administrative" exempts only employees who are primarily engaged in the responsible work which is characteristic of employment in a bona fide administrative capacity. Thus, the employee must have as his primary duty office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or, in the case of "academic administrative personnel," the employee must have as his primary duty work that is directly related to academic administration or general academic operations of the school in whose operations he is employed.

(b) In determining whether an employee's exempt work meets the "primary duty" requirement, the principles explained in § 541.103 in the discussion of "primary duty" under the definition of "executive" are applicable.

§ 541.207 Discretion and independent judgment.

(a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term as used in the regulations in subpart A of this part, moreover, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. (Without actually attempting to define the term, the courts have given it this meaning in applying it in particular cases. See, for example, *Walling v. Sterling Ice Co.*, 69 F. Supp. 655, reversed on other grounds, 165 F. (2d) 265 (CCA 10). See also *Connell v. Delaware Aircraft Industries*, 55 Atl. (2d) 637.)

(b) The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. It has been most frequently misunderstood and misapplied by employers and employees in cases involving the following: (1) Confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards; and (2) misapplication of the term to employees making decisions relating to matters of little consequence.

(c) Distinguished from skills and procedures:

(1) Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment within the meaning of § 541.2. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard.

(2) A typical example of the application of skills and procedures is ordinary inspection work of various kinds. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been cataloged and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They may have some leeway in the performance of their work but only within closely prescribed limits. Employees of this type may make recommendations on the basis of the information they develop in the course of their inspections (as for example, to accept or reject an insurance risk or a product manufactured to specifications), but these recommendations are based on the development of the facts as to whether there is conformity with the prescribed standards. In such cases a decision to depart from the prescribed standards

or the permitted tolerance is typically made by the inspector's superior. The inspector is engaged in exercising skill rather than discretion and independent judgment within the meaning of the regulations in Subpart A of this part.

(3) A related group of employees usually called examiners or graders perform similar work involving the comparison of products with established standards which are frequently cataloged. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for the manual of standards does not convert the character of the work performed to work requiring the exercise of discretion and independent judgment as required by the regulations in subpart A of this part. The mere fact that the employee uses his knowledge and experience does not change his decision, *i.e.*, that the product does or does not conform with the established standard, into a real decision in a significant matter.

(4) For example, certain "graders" of lumber turn over each "stick" to see both sides, after which a crayon mark is made to indicate the grade. These lumber grades are well established and the employee's familiarity with them stems from his experience and training. Skill rather than discretion and independent judgment is exercised in grading the lumber. This does not necessarily mean, however, that all employees who grade lumber or other commodities are not exercising discretion and independent judgment. Grading of commodities for which there are no

recognized or established standards may require the exercise of discretion and independent judgment as contemplated by the regulations in subpart A of this part. In addition, in those situations in which an otherwise exempt buyer does grading, the grading even though routine work, may be considered exempt if it is directly and closely related to the exempt buying.

(5) Another type of situation where skill in the application of techniques and procedures is sometimes confused with discretion and independent judgment is the "screening" of applicants by a personnel clerk. Typically such an employee will interview applicants and obtain from them data regarding their qualifications and fitness for employment. These data may be entered on a form specially prepared for the purpose. The "screening" operation consists of rejecting all applicants who do not meet standards for the particular job or for employment by the company. The standards are usually set by the employee's superior or other company officials, and the decision to hire from the group of applicants who do meet the standards is similarly made by other company officials. It seems clear that such a personnel clerk does not exercise discretion and independent judgment as required by the regulations in subpart A of this part. On the other hand an exempt personnel manager will often perform similar functions: that is, he will interview applicants to obtain the necessary data and eliminate applicants who are not qualified. The personnel manager will then hire one of the qualified applicants. Thus, when the interviewing and screening are performed by the personnel manager who does the hiring they constitute exempt

work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(6) Similarly, comparison shopping performed by an employee of a retail store who merely reports to the buyer his findings as to the prices at which a competitor's store is offering merchandise of the same or comparable quality does not involve the exercise of discretion and judgment as required in the regulations. Discretion and judgment are exercised, however, by the buyer who evaluates the assistants' reports and on the basis of their findings directs that certain items be re-priced. When performed by the buyer who actually makes the decisions which affect the buying or pricing policies of the department he manages, the comparison shopping, although in itself a comparatively routine operation, is directly and closely related to his managerial responsibility.

(7) In the data processing field a systems analyst is exercising discretion and independent judgment when he develops methods to process, for example, accounting, inventory, sales, and other business information by using electronic computers. He also exercises discretion and independent judgment when he determines the exact nature of the data processing problem, and structures the problem in a logical manner so that a system to solve the problem and obtain the desired results can be developed. Whether a computer programer is exercising discretion and independent judgment depends on the facts in each particular case. Every problem processed in a computer first must be carefully analyzed so that exact and logical steps for its solution can be worked out. When this preliminary work is done by a computer programer he is

exercising discretion and independent judgment. A computer programer would also be using discretion and independent judgment when he determines exactly what information must be used to prepare the necessary documents and by ascertaining the exact form in which the information is to be presented. Examples of work not requiring the level of discretion and judgment contemplated by the regulations are highly technical and mechanical operations such as the preparation of a flow chart or diagram showing the order in which the computer must perform each operation, the preparation of instructions to the console operator who runs the computer or the actual running of the computer by the programmer, and the debugging of a program. It is clear that the duties of data processing employees such as tape librarians, keypunch operators, computer operators, junior programers and programer trainees are so closely supervised as to preclude the use of the required discretion and independent judgment.

(d) *Decisions in significant matters.* (1) The second type of situation in which some difficulty with this phrase has been experienced relates to the level or importance of the matters with respect to which the employee may make decisions. In one sense almost every employee is required to use some discretion and independent judgment. Thus, it is frequently left to a truckdriver to decide which route to follow in going from one place to another; the shipping clerk is normally permitted to decide the method of packing and the mode of shipment of small orders; and the bookkeeper may usually decide whether he will post first to one ledger rather than another. Yet it

is obvious that these decisions do not constitute the exercise of discretion and independent judgment of the level contemplated by the regulations in subpart A of this part. The divisions have consistently taken the position that decisions of this nature concerning relatively unimportant matters are not those intended by the regulations in subpart A of this part, but that the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence. This interpretation has also been followed by courts in decisions involving the application of the regulations in this part, to particular cases.

(2) It is not possible to state a general rule which will distinguish in each of the many thousands of possible factual situations between the making of real decisions in significant matters and the making of choices involving matters of little or no consequence. It should be clear, however, that the term "discretion and independent judgment," within the meaning of the regulations in subpart A of this part, does not apply to the kinds of decisions normally made by clerical and similar types of employees. The term does apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise. The regulations in subpart A of this part, however, do not require the exercise of discretion and independent judgment at so high a level. The regulations in subpart A of this part also contemplate the kind of discretion and independent judgment exercised

by an administrative assistant to an executive, who without specific instructions or prescribed procedures, arranges interviews and meetings, and handles callers and meetings himself where the executive's personal attention is not required. It includes the kind of discretion and independent judgment exercised by a customer's man in a brokerage house in deciding what recommendations to make to a customer for the purchase of securities. It may include the kind of descretion [sic] and judgment exercised by buyers, certain wholesale salesmen, representatives, and other contact persons who are given reasonable latitude in carrying on negotiation on behalf of their employers.

(e) *Final decisions not necessary.* (1) The term "discretion and independent judgment" as used in the regulations in subpart A of this part does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment within the meaning of the regulations in subpart A of this part. For example, the assistant to the president of a large corporation may regularly reply to correspondence addressed to the president. Typically, such an assistant will submit the more important replies to the president for review before they are sent out. Upon occasion, after review, the president may alter

or discard the prepared reply and direct that another be sent instead. This section by the president would not, however, destroy the exempt character of the assistant's function, and does not mean that he does not exercise discretion and independent judgment in answering correspondence and in deciding which replies may be sent out without review by the president.

(2) The policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization, may have the plan reviewed or revised by his superiors before it is submitted to the client. The purchasing agent may be required to consult with top management officials before making a purchase commitment for raw materials in excess of the contemplated plant needs for a stated period, say 6 months. These employees exercise discretion and independent judgment within the meaning of the regulations despite the fact that their decisions or recommendations are reviewed at a higher level.

(f) *Distinguished from loss through neglect.* A distinction must also be made between the exercise of discretion and independent judgment with respect to matters of consequence and the cases where serious consequences may result from the negligence of an employee, the failure to follow instruction or procedures, the improper application of skills, or the choice of the wrong techniques. The operator of a very intricate piece of machinery, for example, may cause a complete stoppage of production or a breakdown of his very expensive

machine merely by pressing the wrong button. A bank teller who is engaged in receipt and disbursement of money at a teller's window and in related routine bookkeeping duties may, by crediting the wrong account with a deposit, cause his employer to suffer a large financial loss. An inspector charged with responsibility for loading oil onto a ship may, by not applying correct techniques fail to notice the presence of foreign ingredients in the tank with resulting contamination of the cargo and serious loss to his employer. In these cases, the work of the employee does not require the exercise of discretion and independent judgment within the meaning of the regulations in subpart A of this part.

(g) *Customarily and regularly.* The work of an exempt administrative employee must require the exercise of discretion and independent judgment customarily and regularly. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretion and independent judgment in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretion and independent judgment.

§ 541.208 Directly and closely related.

(a) As indicated in § 541.202, work which is directly and closely related to the performance of the work described in § 541.2 is considered exempt work. Some illustrations may be helpful in clarifying the differences

between such work and work which is unrelated or only remotely related to the work described in § 541.2.

(b)(1) For purposes of illustration, the case of a high-salaried management consultant about whose exempt status as an administrative employee there is no doubt will be assumed. The particular employee is employed by a firm of consultants and performs work in which he customarily and regularly exercises discretion and independent judgment. The work consists primarily of analyzing, and recommending changes in, the business operations of his employer's client. This work falls in the category of exempt work described in § 541.2.

(2) In the course of performing that work, the consultant makes extensive notes recording the flow of work and materials through the office and plant of the client. Standing alone or separated from the primary duty such notemaking would be routine in nature. However, this is work without which the more important work cannot be performed properly. It is "directly and closely related" to the administrative work and is therefore exempt work. Upon his return to the office of his employer the consultant personally types his report and draws, first in rough and then in final form, a proposed table of organization to be submitted with it. Although all this work may not be essential to the performance of his more important work, it is all directly and closely related to that work and should be considered exempt. While it is possible to assign the typing and final drafting to nonexempt employees and in fact it is frequently the practice to do so, it is not required as a condition of exemption that it be so delegated.

(3) Finally, if because this particular employee has a special skill in such work, he also drafts tables or organization proposed by other consultants, he would then be performing routine work wholly unrelated, or at best only remotely related, to his more important work. Under such conditions, the drafting is nonexempt.

(c) Another illustration is the credit manager who makes and administers the credit policy of his employer. Establishing credit limits for customers and authorizing the shipment of orders on credit, including the decisions to exceed or otherwise vary these limits in the case of particular customers, would be exempt work of the kind specifically described in § 541.2. Work which is directly and closely related to these exempt duties may include such activities as checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis and writing letters giving credit data and experience to other employers or credit agencies. On the other hand, any general office or bookkeeping work is nonexempt work. For instance, posting to the accounts receivable ledger would be only remotely related to his administrative work and must be considered nonexempt.

(d) One phase of the work of an administrative assistant to a bona fide executive or administrative employee provides another illustration. The work of determining whether to answer correspondence personally, call it to his superior's attention, or route it to someone else for reply requires the exercise of discretion and independent judgment and is exempt work of the kind described in § 541.2. Opening the mail for the purpose of reading it to make the decisions indicated will be

directly and closely related to the administrative work described. However, merely opening mail and placing it unread before his superior or some other person would be related only remotely, if at all, to any work requiring the exercise of discretion and independent judgment.

(e) The following additional examples may also be of value in applying these principles. A traffic manager is employed to handle the company's transportation problems. The exempt work performed by such an employee would include planning the most economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise in transit and making the necessary rearrangements resulting from delays, damages, or irregularities in transit. This employee may also spend part of his time taking city orders (for local deliveries) over the telephone. The order-taking is a routine function not directly and closely related to the exempt work and must be considered nonexempt.

(f) An office manager who does not supervise two or more employees would not meet the requirements for exemption as an executive employee but may possibly qualify for exemption as an administrative employee. Such an employee may perform administrative duties, such as the executive of the employer's credit policy, the management of the company's traffic, purchasing, and other responsible office work requiring the customary and regular exercise of discretion and judgment, which are clearly exempt. On the other hand, this office manager may perform all the bookkeeping, prepare the confidential or regular payrolls, and sent out monthly

statements of account. These latter activities are not directly and closely related to the exempt functions and are not exempt.

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